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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. ~~1128~~ 148

JONES COAL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
for the use and benefit of
RICHARD P. JAHN, TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Miscellaneous:

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IN THE

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NO. .....

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Petitioner,

v.

UNITED STATES OF AMERICA,
for the use and benefit of
RICHARD P. JAHN, TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on March 29, 1966.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Tennessee, Southern Division (14a*), is not reported. The opinion of the Court of Appeals for the Sixth Circuit (Appendix C hereto, page 11) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was dated March 29, 1966, and was entered the same day (Appendix D hereto, page 14). A petition to rehear was denied April 13, 1966 (Appendix E hereto, page 16). The jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Rule 25(c), Federal Rules of Civil Procedure, provides that in case of a transfer of interest, an action may be continued by the original party.

The question presented is, does this rule authorize the continuance in the corporate name of an action brought by a corporation, after the corporate charter has been revoked for non-payment of taxes, where the decisions of the state of incorporation provide for the abatement of such an action?

STATUTES INVOLVED

Rule 25, Federal Rules of Civil Procedure, reads in part as follows:

> (a)(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be

* Reference to 14a is to pages in the appendix of the appellant in the Court of Appeals.

made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party. As amended Jan. 21, 1963, eff. May 1, 1963.

* * *

(c) *Transfer of Interest.* In case of any transfer of interest, the action shall be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Rule 17(b), Federal Rules of Civil Procedure, reads, in part, as follows:

. . . The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. . . .

STATEMENT OF THE CASE

On January 17, 1961, the Complaint was filed in this action. Jurisdiction was based upon the Miller Act, 40 U.S.C. Sections 270(a), et seq. A counterclaim was filed on February 28, with the Answer. On January 20,

1962, the plaintiff, Air Comfort, Inc., made an assignment to Richard P. Jahn of any sums payable to Air Comfort as a result of any final judgment in this case, subject to the prior payment of all attorneys' fees and expenses incurred in the collection of the claim (10a). The defendant Jones Coal Company was informed of this assignment.

After trial to the Court without a jury, an opinion was filed on October 22, 1962. On November 13, 1962, the corporate charter of Air Comfort was revoked by the Secretary of State of Tennessee for nonpayment of taxes (13a). On November 21, 1962, a judgment order was entered in favor of Air Comfort, Inc., the amount being the amount claimed by Air Comfort less certain credits allowed Jones Coal Company on its counterclaim. No mention of interest appears in this order (5a).

On May 7, 1963, the judgment was amended to recognize certain errors and additional credits on the counterclaim. The order refers erroneously to the "judgment of the Court heretofore entered on October 22, 1962" (8a).

Jones Coal Company appealed. While the case was pending on appeal, it was discovered that Air Comfort had no corporate charter when the first judgment was entered on November 21, 1962, and a motion to remand for dismissal was made on April 16, 1964, and denied. A motion by Air Comfort to substitute was also denied (Appendix A hereto, page 9), with a suggestion that it could be considered by the District Court on remand. The case was remanded on August 10, 1964 (Appendix B hereto, page 10). On August 28, 1964, a motion to substitute under Rule 25(c), Federal Rules of Civil

Procedure, was filed by the attorneys for Air Comfort, and this motion included also a motion to enter a judgment in favor of Richard P. Jahn for the amount of the judgment as amended May 7, 1963, with interest from October 22, 1962 (9a). Jones Coal Company moved the Court on November 4, 1964, to declare the judgments in favor of Air Comfort void for want of a real party in interest, and to dismiss the case (12a).

No action was taken on the motion of Jones Coal Company. On November 23, 1964, the District Court filed an opinion and order granting the motion of Air Comfort (14a), and an amended judgment was entered by the clerk that same day (16a). Upon appeal the District Court was affirmed (Appendix C hereto, page 11).

ARGUMENT

Rule 25, Federal Rules of Civil Procedure, provides for the substitution of parties where a party dies, becomes incompetent, or transfers his interest to another. The procedure for this substitution is set out in 25(a). No mention of any substitution after the dissolution of a corporation appears in this rule. Rule 17, F.R.C.P., indicates that the capacity of a corporation to sue (and, presumably, to maintain a pending suit) "shall be determined by the law under which it was organized."

Kyle v. Ewing, 73 Tenn. 580, holds that "The rule that at law no action can be maintained by or against a corporation after it has ceased to exist except upon express legislative authority, has never been changed in this state."

Hornstein, in his text on Corporation Law and Practice, Vol. II, Section 793, page 344, expresses the common law view:

> "The common law's concept of corporateness was so completely metaphysical that upon dissolution a corporation's unsold real estate reverted back to the original granter, or his heirs; personal property escheated to the state; all debts to and from the corporation were extinguished; and no suit could thereafter be maintained for or against the corporation."

In *Oklahoma Natural Gas Co. v. State of Oklahoma*, 273 U.S. 257, Mr. Chief Justice Taft wrote:

> "There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect (citing many cases). It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. . . . if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the Court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being."

Air Comfort did not take advantage of the statutory

dissolution provided for in Tennessee. Rather, it permitted its charter to be revoked for failure to pay taxes. Prior to the revocation of its charter, the corporation could, under the provisions of Rule 25(c) continue to remain the named plaintiff in this action; or an assignee could have been substituted upon order of the Court. But subsequent to the revocation of the charter a *substitution* is obviously impossible. *There was no party for a substitute to replace.* The obligation of the defendant is not in question, but the identity of the plaintiff. *The defendant has no assurance that prior claims for attorneys' fees, taxes, or claims against the corporation by creditors do not exist.*

At the time of the revocation of the charter it is clear that (1) Air Comfort went out of existence; and (2) the rights possessed by Air Comfort passed to some other entity or person. The quotation from *Oklahoma Natural Gas Co. v. State of Oklahoma, supra,* makes it clear that the question of continuation is substantive, not procedural. In *Bland v. Knox Concrete Products*, 207 Tenn. 206, 338 S.W. 2d 605, the Tennessee Supreme Court, while recognizing that the obligation still existed, required the abatement of a suit in the name of the nonexistent corporate entity. This should also take place in this case, where the assignment is subject to the prior payment of all attorneys' fees and expenses incurred in the collection of the claim. See also *Illinois Surety Co. v. U. S. ex rel Peeler*, 240 U.S. 214.

The question for this Court then is plain: Does Rule 25(c), Federal Rules of Civil Procedure, as promulgated by this Court, extend the existence of a corporation after its charter is revoked for nonpayment of taxes, so that by motion—made more than twenty months after the revocation of the charter, and more than four months

after the revocation of the charter was called to the attention of the Court—a partial assignee can be substituted for the former corporation?

CONCLUSION

The "substitution" under Rule 25(c) should be annulled, and the case remanded for dismissal, without prejudice to the rights of the successors in interest of the corporation to make such claims as they may see fit.

Respectfully submitted,

SIZER CHAMBLISS
610 Maclellan Building
Chattanooga, Tennessee

Attorney for Petitioner

May 1966.

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 15,517

UNITED STATES OF AMERICA, for the use and benefit of AIR COMFORT, INC.,

Plaintiff & Cross-Defendant Appellee,

v.

JONES COAL COMPANY,

Defendant & Cross-Plaintiff Appellant.

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided July 10, 1964

Before: WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

PER CURIAM. This appeal is from a judgment for the plaintiff in an action under the Miller Act to collect the balance due on a contract to install air-conditioning in the United States Courthouse at Chattanooga, Tennessee. The defendant filed a counterclaim for damages. The District Judge adopted findings of fact and conclusions of law. In the appeal, only factual issues were raised. In our opinion, the findings of fact of the District Judge are not clearly erroneous and there is no merit in the appeal.

The motion to remand for dismissal is overruled. The motion filed by the plaintiff to add additional parties may be considered by the District Court upon remand of the case.

The judgment of the District Court is affirmed.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 15,517

UNITED STATES OF AMERICA, for the use and benefit of AIR COMFORT, INC.,
Plaintiff & Cross-Defendant Appellee,

vs.

JONES COAL COMPANY,
Defendant & Cross-Plaintiff Appellant.

JUDGMENT - Entered July 10, 1964

[Filed in District Court August 10, 1964]

Before: WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that plaintiff & cross-defendant appellee recover from defendant and cross-plaintiff appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Approved for entry:

PAUL C. WEICK
Chief Judge

APPENDIX C

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 16,350

UNITED STATES OF AMERICA, for the use and benefit of Richard P. Jahn, as trustee of Air Comfort, Inc.,
Plaintiff-Appellee,

v.

JONES COAL COMPANY,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided March 29, 1966

Before WEICK, Chief Judge, and PHILLIPS and CELEBREZZE, Circuit Judges.

PHILLIPS, Circuit Judge. The district court rendered a judgment in favor of Air Comfort, Inc. as use-plaintiff in an action under the Miller Act, 40 U.S.C. §270 et seq., to collect the balance due on a contract to install air conditioning in the United States Courthouse at Chattanooga, Tennessee. This court affirmed, ruling that the motion of plaintiff to add additional parties could be considered by the district court on remand. 333 F. 2d 846 (C.A. 6, 1964). In an earlier opinion we overruled appellant's motion to dismiss the appeal. 325 F. 2d 877 (C.A. 6, 1963).

On January 20, 1962, Air Comfort assigned to Richard P. Jahn, trustee, all rights under its claim against appellant. This assignment was made known to appellant before the trial, but the record does not reflect any effort

on the part of either appellant or appellee to cause the substitution of the trustee as a party under Rule 25(c), Federal Rules of Civil Procedure, until after the remand by this court on the first appeal.

On November 13, 1962, the corporate charter of Air Comfort was revoked by the Secretary of State of Tennessee for nonpayment of state corporate franchise taxes pursuant to T.C.A. §67-2925.[1]

Upon remand, the district court substituted the trustee as use-plaintiff and entered an amended judgment against appellant for $14,284.16 with interest from the date of its former opinion rendered October 22, 1962.

Appellant argues that the original judgment was void because Air Comfort did not "exist" as a corporation at the time it was entered and that the district court erred in amending the judgment by substituting the trustee as use-plaintiff. Various technical contentions are asserted in support of this position, all of which we find to be

[1] This statute, as amended in 1963, is as follows:

"67-2925. Revocation of charter for nonpayment of tax.—The commissioner of revenue shall certify to the secretary of state the name of any corporation which fails or refuses to file the report and to pay the tax herein required in all cases where such report and tax payment have not been made within ninety (90) days after due date. At the time of such certification to the secretary of state, the commissioner of revenue shall give notice to the corporation of the action taken. Thereupon the charter of such corporation or its domestication in Tennessee shall stand as automatically revoked and the secretary of state shall note such revocation upon his records. At any time after date of revocation such charter may be reinstated upon the filing of all reports and the payment of all fees, taxes, penalty and interest due the state, provided, however, the title has not been taken by another corporation, and further provided that proof be furnished sufficient to the commissioner that no third party will be injured by such reinstatement."

The 1963 amendment removed a one-year limitation period for reinstatement of charters revoked for nonpayment of taxes.

without merit.

Under Tennessee law the revocation of the charter of a corporation for nonpayment of taxes does not result in the abrogation of its choses in action. Those who owe money to the corporation are not relieved of their obligations. The revocation of the corporate charter of Air Comfort did not relieve appellant of liability to the successor in interest of this corporation. *Bland v. Knox Concrete Products*, 207 Tenn. 206, 338 S.W. 2d 605.

In the present case Air Comfort assigned to the trustee its claim against appellant approximately ten months prior to the revocation of its charter. Whatever may have been the legal effect of the revocation of this charter, the trustee is the assignee of the claim of Air Comfort against appellant which is involved in this litigation.

Rule 25(c), Federal Rules of Civil Procedure, provides that:

"In case of any transfer of interest the action may be continued by the or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." We hold that the district court acted within its reasonable discretion and in accordance with the foregoing rule in substituting the trustee as use-plaintiff. *Jones v. Village of Proctorville*, 303 F. 2d 311 (C.A. 6, 1962).

Appellant further contends that the district court erred in allowing interest from October 22, 1962, the date of its original opinion. We find this contention likewise to be without merit.

Affirmed.

APPENDIX D

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 16, 350

UNITED STATES OF AMERICA, for the use and benefit of RICHARD P. JAHN, as trustee of AIR COMFORT, INC.,
Plaintiff-Appellee,

vs.

JONES COAL COMPANY,
Defendant-Appellant.

BEFORE: WEICK, Chief Judge, PHILLIPS and CELEBREZZE, Circuit Judges.

JUDGMENT

(Filed March 29, 1966)

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover

from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS
Clerk

A True Copy.

Attest:

/s/ Carl W. Reuss
Carl W. Reuss, Clerk

Issued as Mandate: April 20, 1966

COSTS: NONE

Filing fee.....	$ —
Printing	$ —
Total	$ —

APPENDIX E

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 16, 350

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JONES COAL COMPANY,
Defendant-Appellant.

} ORDER

(Filed April 13, 1966)

Before WEICK, Chief Judge, and PHILLIPS and CELEBREZZE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT.

CARL W. REUSS
CLERK